SUPREME COURT, U. S.

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Nos. 1141 and 1146

In the Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF NEW YORK, ET AL.

v.

UNITED STATES OF AMERICA, ET AL.

SCHOOL DISTRICT OF PHILADELPHIA, ET AL.

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the order of the district court be affirmed.

STATEMENT

These are direct appeals from an order of the district court (J.S. No. 1141, App. B) denying appellants' motions to intervene in opposition to final consent judgments (J.S. No. 1141, App. C) entered in

antitrust actions brought by the United States against publishers of children's books.

1. After lengthy investigation,[1] the United States, on April 18, 1967, filed in the District Court for the Northern District of Illinois 18 separate civil suits, each charging that the defendant publisher and numerous wholesalers to whom it sold had conspired to "fix, maintain, and stabilize" the wholesalers' resale prices on library editions[2] of children's books, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (J.S. No. 1141, App. A). In addition to seeking general injunctive relief, the complaints sought prohibitions upon a variety of specific practices, including the use of such phrases as "net price," which suggest resale prices (*id.*, Prayer (C)(1), (2)); and refusals to sell to, delays or misdirection of orders from, or discrimination against any purchaser, because of the resale price of the books purchased (*id.*, Prayer (C)(3), (4)).

Negotiations over possible consent judgments began soon thereafter. On October 23, 1967, a proposed consent judgment was filed in each case with a stipulation that the judgment could be entered after 30 days unless the government withdrew its consent in the interval (J.S. No. 1146, p. A6).

[1] A six-month grand jury investigation gave rise to the evidence on which these cases were based. The Department of Justice concluded, however, that the evidence would not justify a criminal prosecution.

[2] Children's books having a stronger binding than the ordinary or "trade" editions are called "library" editions, and are especially designed for school and library purchasers.

The substantive provisions of the judgments were identical. There were general, permanent injunctions against price-fixing, collusive bidding, and other unlawful pricing practices with respect to the sale of any books to any persons (J.S., No. 1141, p. 6c, ¶ VII). Other provisions permanently forbade a variety of practices by which the publishers might influence the prices at which wholesalers resell books to schools, libraries and governmental agencies. There were prohibitions against restricting or limiting the school and library customers to whom wholesalers may sell (*id.*, p. 4c, ¶ VI (A)); policing or suggesting prices (other than by imprinting a price without more on the book jacket) at which wholesalers resell books to such customers (*id.*, ¶ VI (B)); and cutting off or refusing to deal with any wholesaler because of the resale price charged any such customer (*id.*, ¶ VI (C) (D)). These latter provisions also prohibited, for five years, any activity directed toward lawful resale-price maintenance (*id.*, ¶ VI Proviso). The decrees further required that promotional material and catalogues which are sent to wholesalers and contain the publishers' school and library prices must contain a statement that the wholesaler is free to charge whatever prices he wishes for the defendants' books (*id.*, ¶ VI (F)).

Each defendant was to be directed, for a period of five years, to mail copies of the decree to wholesalers with whom it dealt and within six months to give notice of the decree to schools, libraries and government agencies to whom it mails catalogues (*id.*, ¶ IV). Each also was to be enjoined for five years from using the

term "net price" in connection with all books other than textbooks [3] (*id.*, p. 4c, ¶ V). Over the same period, the publishers were to furnish with all bids over $100 a written certification that the bid was not the result of any agreement, understanding, plan, or program between the publisher and any other person (*id.*, p. 7c, ¶ IX).

2. Appellants are various States, municipalities, and local school boards. Prior to the filing of the proposed consent decrees, several appellants had instituted treble-damage actions against the publishers, alleging that overcharges had resulted from violations of the Sherman Act.[4] Several of their counsel asked the Department of Justice to insist upon a so-called "Asphalt" clause [5] in any consent decree—*i.e.*, an admission of violation of Section 1 of the Sherman Act that could be used under Section 5(a) of the Clayton Act as *prima facie* evidence in the treble-damage actions. The publishers, however, made clear to the government that they would not consent to such a provision (Tr. Nov. 13, 1967, p. 60).

After the proposed decrees were filed, appellants [6]

[3] Textbooks generally are not sold through wholesalers.

[4] The treble-damage actions charge price-fixing among the publishers as well as the publisher-wholesaler conspiracies alleged in the government cases.

[5] The clause takes its name from one of the three related cases where it was used, *United States* v. *The Lake Asphalt and Petroleum Company*, 1960 Trade Cases ¶ 69,835. See, also, *United States* v. *Bituminous Concrete Association, Inc.*, 1960 Trade Cases ¶ 69,878; *United States* v. *Allied Chemical Corp.*, 1961 Trade Cases ¶ 69,923.

[6] Two parties who have not appealed also sought and were denied leave to intervene below. Their contentions were the same as appellants'.

sought intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure, or, alternatively, discretionary intervention under Rule 24(b). They argued that no decree should be entered unless it contained an "Asphalt" clause. Some of them also demanded a summary of, and access to, evidence the government had collected during its investigations. At a hearing held on November 13, 1967, on the intervention petitions, appellants sought four additional items of relief: (1) the decrees should require the defendants to publish children's books in trade editions or in loose leaf form for subsequent binding ("prebinder sheets"), as well as in library editions; (2) the decrees should deal with, as by some form of compulsory licensing, alleged "abuse of * * * copyrights"; (3) text books should not be exempted from the prohibition of the use of the terms "net" or "net price"; and (4) the visitation provisions allowing the government future access to the publishers' records and employees for the purpose of investigating compliance with the decrees should be amended to make any information thereby obtained available to appellants. (Tr. Nov. 13, 1967, pp. 127–128; 129–130; 130–131; 144–146).

3. The court allowed appellants to participate fully as *amici curiae*. It took under advisement the argument that the decrees should contain "Asphalt" clauses, and ordered the parties and appellants to negotiate on the other points. Following such negotiations, appellants, on November 16, withdrew their proposals relating to the alleged "abuse of copyright" and the use of the term "net" in textbook pricing (Tr. Nov.

16, 1967, pp. 11–13). The decrees were modified to provide that any evidence of a violation of the decrees obtained during visitation and "which adversely affects the interest of any State or local governmental agency or instrumentality" would be impounded for a period of one year and would be released to any State or local governmental agency upon a showing of good cause (Tr. Nov. 16, 1967, 68–69; J.S. No. 1141, p. 8c ¶ X).

Neither the United States nor any of the *amici* was able to show that any absence of trade editions or prebinder sheets resulted from or was connected in any way to unlawful conduct. Consequently the court rejected appellants' request that publication of such editions be required, noting that the retention of jurisdiction in the decrees would allow remedial action upon any subsequent showing of noncompetitive curtailment of production and sale of trade editions (Tr. Nov. 16, 1967, pp. 62–64).

On November 20, the court impounded all documents, grand jury subpoenas and transcripts of grand jury testimony in the possession of the Department of Justice,[7] and directed their retention until further order of the Chief Judge of the United States District Court for the Northern District of Illinois. There are pending before him appellants' petitions for release of the documents to them.

On November 27 the court approved and entered the modified consent judgments, and denied inter-

[7] The text of the order is printed in the Appendix to this motion (pp. 16–17, *infra*).

vention. Noting that appellants had been "fully heard as amici curiae," the court held that they had not established any right to intervention under Rule 24(a)(2), and that discretionary intervention under Rule 24(b) would unduly delay and prejudice adjudication of the rights of the parties.

ARGUMENT

1. Appellants sought intervention in this litigation and opposed the consent judgments not because they had any serious objection to the adequacy of such judgments to provide effective relief against the alleged unlawful practices,[8] but because they insisted that this litigation should not be terminated unless the defendants made some concession of violation which appellants could use in their private treble damage suits. They sought such intervention under Rule 24(a)(2) of the Federal Rules of Civil Procedure, which gives a right to intervene

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical

[8] At most, one of the five additional items of substantive relief which the appellants sought (see *supra*, p. 5) is still in dispute: a requirement that the defendants publish trade editions and pre-binder sheets. Neither appeal refers to this issue in the "Questions Presented," but appellants in No. 1141 refer to it in passing (J.S. No. 1141, p. 6; n. 5a, p. 8; p. 16, 25). There cannot be any serious question, however, about the propriety of the district court's refusal to insist upon a clause for which, as noted (p. 6, *supra*), no one was able to show any need and which can be added if changed conditions make it appropriate.

> matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Appellant's basic argument is that since Section 5(a) of the Clayton Act permits the use in a private antitrust suit of an adjudication of violation in a government antitrust suit as *prima facie* evidence of such violation,[9] any disposition of the government litigation that does not provide them with a similar benefit will "impair or impede" their ability to prosecute their own cases.

Obviously, either the inclusion of "Asphalt" clauses in the consent judgments or the successful trial of the government's suits, resulting in adjudications of violation, would aid the appellants in prosecuting their treble damage actions. But it does not follow that a settlement of the government cases that denies the appellants such benefits "impair[s] or impede[s]" their ability effectively to prosecute their own actions within the meaning of Rule 24(a)(2). On the contrary, where the interest sought to be protected through intervention is the successful prosecution of

[9] Section 5a provides in relevant part:

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws * * * as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken * * *.

another suit, we submit that the thrust of the Rule is to guarantee participation only where the disposition of the action may have some direct, affirmatively detrimental impact upon the conduct of the other suit. The lack of such collateral benefits as would flow to a third party if the suit in which intervention is sought were successfully litigated rather than settled do not constitute the kind of impairment or impediment the Rule is designed to avoid. Cf. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432, 438 (C.D. Calif.), affirmed *sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580.

This distinction is illustrated by comparing the present case with *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129. In *El Paso*, Cascade, a purchaser of natural gas from a pipeline company that El Paso had illegally acquired in violation of Section 7 of the Clayton Act, was held to have standing under Rule 24(a)(2) to intervene to oppose a consent judgment for the divestiture of the pipeline company. Cascade contended that the terms upon which divestiture was proposed would not provide the divested company with adequate gas reserves and would impose unjustifiable conditions upon its operations, to Cascade's economic detriment as a customer. Although Cascade could have filed its own Section 7 suit seeking further divestiture, the consent decree necessarily would have determined with finality the character of the divested company, and it would have been virtually impossible as a practical matter for another court subsequently to alter substantially the form of divestiture.

In the present case, on the other hand, nothing in the consent judgments as a practical matter prevents the appellants from obtaining the full measure of the relief they are seeking in their private suits. If they can prove violations by the defendants and establish their injury therefrom, they are entitled to recover; and their position in this respect is no worse now than it was either before the consent judgments were entered or before the government suits were filed. The full scope of pre-trial discovery is available to them. Indeed, the appellants on their pending applications may be given access to the evidence obtained by the government in its investigation of these cases—a benefit that may be just as important as the use of any adjudication of violation. Cf. *Minnesota Mining & Manufacturing Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 319.

2. Our conclusion that the settlement of a government antitrust suit without an "Asphalt" clause does not have the kind of impact upon the ability of private treble damage plaintiffs to litigate their cases that would entitle them to intervene under Rule 24(a)(2) is confirmed by two interrelated public policy considerations: the basic design of Section 5 of the Clayton Act, and the seriously adverse impact upon the enforcement of the antitrust laws by the Department of Justice that would result from acceptance of appellants' argument.

Although Section 5 generally provides that a final adjudication of violation in a government antitrust suit shall be *prima facie* evidence thereof in any pri-

vate suit brought against the same defendant, a proviso makes that provision inapplicable "to consent judgments or decrees entered before any testimony has been taken * * *." Congress has made clear that the purpose of the proviso is to encourage defendants to settle government actions before trial. See S. Doc. 584, 63d Cong., 2d Sess., p. 6; 51 Cong. Rec. 15638, 15825, 16276. Congress thus made the judgment that it was in the public interest to deny private treble damage litigants the benefits of the effect of an adjudication in government litigation in order to achieve settlement of such litigation without the delay and uncertainties that necessarily accompany a trial on the merits.

This judgment reflects the practical realities of government antitrust enforcement. Resources simply are not available to investigate and prosecute to completion every possible antitrust violation. Terminating cases through consent decrees that provide effective relief enables the government to employ its limited personnel and facilities more effectively.[10] In addition, where such a consent decree can be obtained, the government's prime objective—a change in the

[10] A member of the congressional conference committee that drafted the proviso of Section 5(a) stated:

> * * * One attorney and a stenographer settled the celebrated New Haven case, whereas if we had given this *prima facie* effect to that judgment the Government would have been fighting now, and possibly for years, and it would have cost the Government millions of dollars to bring them to their knees, for they would not have "consented" to such a judgment. * * * [51 Cong. Rec. 16276 (1914), Remarks of Representative Webb].

defendant's business practices—is accomplished and the public obtains the benefits thereof sooner than it would if the case were litigated. Finally, a consent judgment guarantees definite relief, as opposed to the uncertainty of outcome that exists whenever a case goes to trial.

These benefits of consent decrees are not simply theoretical. During recent years, more than 70 percent of the antitrust injunctive suits brought by the Department of Justice have been terminated by consent judgments.[11] The Department's experience has been that rather than accept a consent decree containing an "Asphalt" clause, defendants will go to trial. Requiring the government to try every case where the defendants reject an asphalt clause—and the government's experience indicates that this would be virtually all cases—would severely reduce the number of cases the Department could bring; and this would be so even if the government were to insist on "Asphalt" clauses only in "price fixing" cases where public agencies have been injured.[12]

[11] See Report of the Antitrust Subcommittee No. 5, House Committee on the Judiciary, 86th Cong., 1st Sess., *On Consent Decree Program of the Department of Justice*, pp. 7–10; Hearings on S. 2512 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 2d Sess, pp. 86–87.

[12] Appellants contend (J.S. No. 1141, p. 12) that the settlement of government civil antitrust price-fixing suits through consent judgments not containing an "Asphalt" clause means that "price-fixing apparently involves only acceptable businessman's risks"; and that the effectiveness of treble damage suits as a deterrent to violation of the antitrust laws is seriously weakened. This argument ignores the fact that the possibility of criminal prosecution is no less effective a deterrant than treble

Moreover, it is difficult to see any basis upon which courts validily could distinguish between price-fixing and other *per se* offenses, or between cases in which the private plaintiffs seeking to block settlement of the government suit were public bodies rather than private persons. For if the arguments that appellants make to justify denying the government the right to settle a case on a basis that provides all the relief it seeks are valid here, they would seem equally valid in those other situations. Thus, the inevitable practical result of accepting appellants' argument would be to prevent the government from using consent decrees in a large, if not the major, portion of its civil cases—with a concomitant reduction in government antitrust enforcement.[13]

3. In the present cases the consent judgments fully terminated all the defendants' alleged illegal business practices as demanded by the government, and provided adequate relief against their repetition. The district court permitted the appellants to present their

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damage liability. (In the present case, as noted *supra*, p. 2, n. 1, a grand jury investigated the defendants' practices, but the government concluded that the evidence did not warrant a criminal proceeding.) Moreover, there have been many successful treble damage suits resulting in large recoveries even where no government suit was brought, so that there is no reason to believe that the fact that some government suits are terminated without an adjudication or an "Asphalt" clause significantly diminishes the deterrent effect of such private litigation.

[13] The time that would be necessary to try the present cases and the resulting delay in the provision of any relief justify the district court's conclusion (J.S. No. 1141, p. 4b) that permissive intervention under Rule 24(b) "would unduly delay and prejudice the adjudication of the rights of plaintiff and the defendants * * *."

objections to the decrees fully as *amici*. The settlement of these cases completely accomplished the government's objective in filing the suits, and did so without the uncertainty, delay and expense that would have resulted had the cases been tried. Congress has struck the balance in Section 5 of the Clayton Act that in such circumstances the desirability of a prompt settlement outweighs any failure to provide a further benefit to the private plaintiffs. The district court did not abuse its discretion in entering the judgments rather than forcing the government to go to trial.

CONCLUSION

The order of the district court denying appellants' motions to intervene should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
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DONALD F. TURNER,
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SEYMOUR H. DUSSMAN,
Attorney.

APRIL 1968.

APPENDIX

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

UNITED STATES OF AMERICA, PLAINTIFF

v.

HARPER & ROW, PUBLISHERS, INC., AND RELATED CASES, DEFENDANTS

Civil Action No. 67 C 612 Through 67 C 629

Entered November 20, 1967

Order Impounding Documents

The United States of America, plaintiff herein, having made an investigation which resulted in the filing of the eighteen captioned civil injunctive cases; and it appearing that numerous treble damage actions based in large part on the same facts as alleged in these civil injunctive actions have been and may be filed in various United States District Courts by States, municipalities, school districts and other purchasers of children's books; that motions have been or may be made in these treble damage actions for the production of documents, grand jury subpoenas, and grand jury testimony presently in the possession of plaintiff; and that it is in the public interest that these documents, grand jury subpoenas, and grand jury testimony be identifiable and preserved and remain together for possible use in these treble damage actions.

IT IS ORDERED, ADJUDGED AND DECREED that all documents procured by process or otherwise by the plaintiff from any individual, partnership, firm, or corporation during its investigation of trade and commerce in the sale of children's books, all grand jury subpoenas, and all grand jury transcripts of testimony but not internal memoranda or work product of plaintiff have been impounded in the custody of John E. Sarbaugh, Chief of the Midwest Office of the Antitrust Division, and shall be retained in his possession, control, and custody on the 26th floor of the United States Courthouse, 219 South Dearborn Street, Chicago, Illinois, until further order of the Chief Judge of the United States District Court for the Northern District of Illinois.

It is further ordered that each owner of the documents described herein shall be permitted access to his documents for inspection and copying without futher order.

Entered:

A. L. MAROVITZ,
United States District Judge.

NOVEMBER 20, 1967.

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